In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 307

ROYAL INSURANCE COMPANY, LTD.,
(a corporation),
Petitioner,

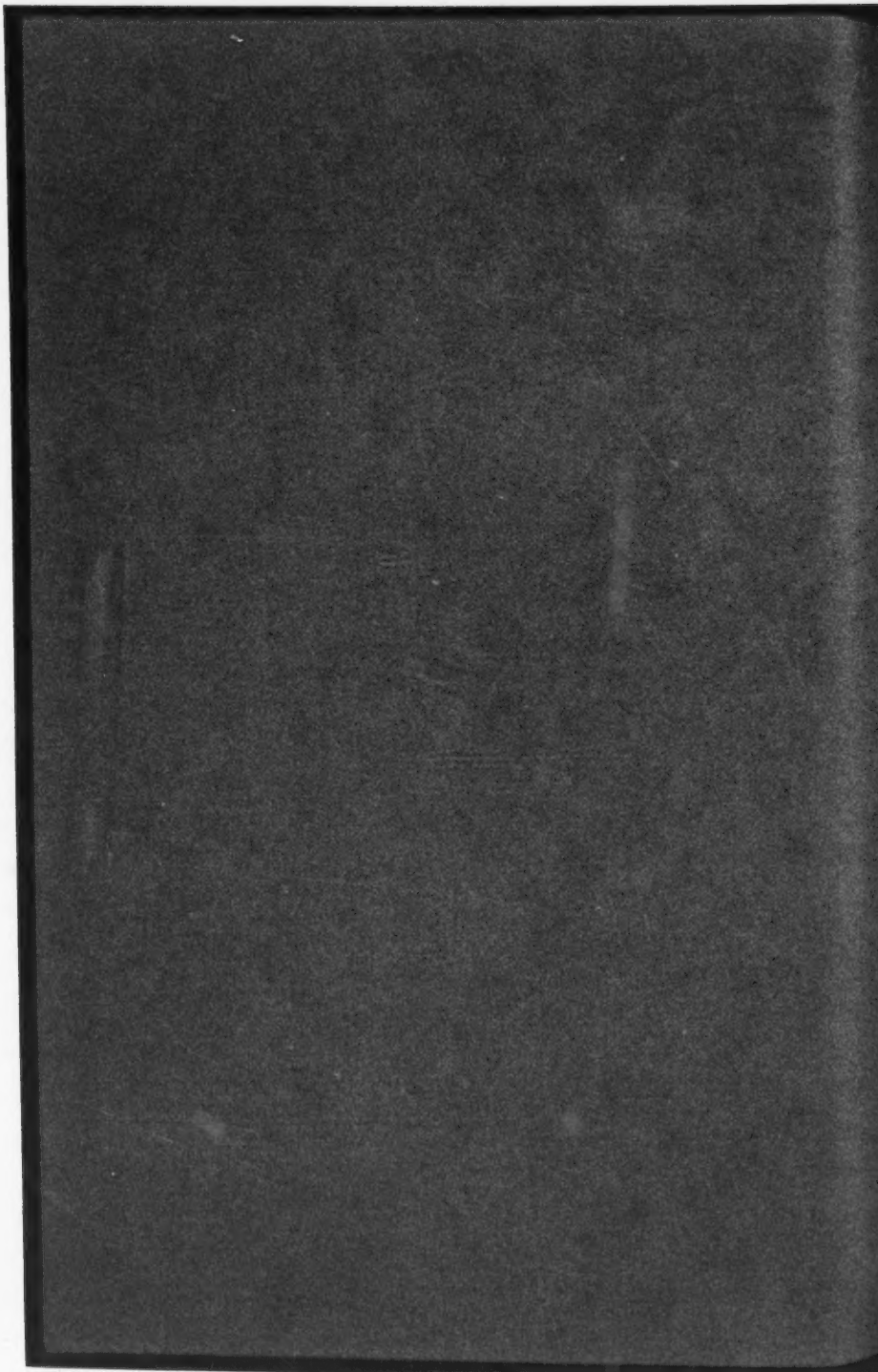
vs.

ROBERT A. SMITH,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. B. BIANCHI,
Kohl Building, San Francisco, California,
JAMES M. HANLEY,
Shreve Building, San Francisco, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA



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May it please the Court:

The respondent in opposition to the granting of the petition for writ of certiorari respectfully shows that the case made warrants the invocation of the jurisdiction of this Court *neither* under Sec. 240 of the Judicial Code *nor* Sec. 5 of Rule 38 of this Court.

A reading of the questioned decision will without the citation of authorities, other than therein referred to, confirm the conclusion not only that it is well sup-

ported by those authorities but that it is sound in principle and accomplishes substantial justice.

Neither of the points urged by petitioner fall within the letter or spirit of Subs. (a), (b) or (c) of Sec. 5 of Rule 38 of the U. S. Supreme Court.

There are no constitutional or questions of Federal law, important or otherwise, involved; nor does the petition point any question which should be settled by this Court; nor does the decision cover Federal questions which are in any way or at all likely to conflict with applicable decisions of this or any Court. The issues revolve entirely upon local or state laws. And the cause grows out of a California contract.

Upon a question controlled by state or local law, even actual or probable conflict among the Circuits (and none is pointed) is not of itself a reason for granting the writ. Nor should this Court be asked merely to review the evidence or inferences drawn from it in connection with the second point made—i. e., as to whether the evidence spells the relation of landlord and tenant or lessee and lessor.

Ruhlin v. N. Y. Life Ins. Co., 58 S. Ct. 860, 304 U. S. 202, 82 Law. Ed. 1290.

I.

PETITIONER'S GRIEVANCE IS ANTICIPATORY.

A careful reading of the petition impels the conclusion that the petitioner has yet suffered no prejudice—that his grievance is in the main anticipatory. There

is yet no final judgment. The allegedly *errant* opinion holds that the respondent had an insurable interest and that the policy upon which the complaint is bottomed insured *that* interest—then remands the cause for new trial to insure the petitioner an "opportunity to prove such affirmative defenses as may be available to it." By analogy to Supreme Court appellate procedure, the petition should be denied.

Slaker v. O'Connor, 49 S. Ct. 158, 278 U. S. 188, 73 Law. Ed. 258.

II.

THE DECISION IS NOT CONTRARY TO LAW.

The petition urges two points or "reasons" for the allowance of the writ.

A. The first of these is that it is not within

> "* * * the appropriate function of an Appellate Court to reverse a judgment *admittedly correct* (under the pleadings, evidence and law of the case) for the *sole reason* that another trial might result differently if the losing party amends his pleadings to rely upon *a new and different theory* of recovery." (Italics ours throughout.)

1. It would seem to be the *first and eminently* "appropriate function" of any Court to correct its own error—particularly where such error may have resulted in confusing both the plaintiff and the trial Court.

The first opinion herein (77 Fed. (2d) 157) held that your respondent, under his pleadings and the

evidence addressable to it, was no more than a bare licensee—without, of course, any insurance interest. It required him *not to plead a new cause of action*—for the cause of action remained but one on a contract of insurance[1]—but to set forth the nature of his insurable interest or tenure.

The burden of that holding was not that the insured had failed to prove an insurable interest but that he had failed to allege it. Hence the language (77 Fed. (2d) 159):

> "However, since the insurance company has not had an opportunity to meet and defend against any other theory of liability, the cause must be sent back for retrial. The demurrer to the complaint should have been sustained with leave to the plaintiff to amend * * *".

Your respondent accordingly set forth by amended complaint a narrative of the whole transaction. And, if he was guilty of overalleging, it is now patent *not only* that petitioner was not injured, *but* that the confusion, if any, was entirely attributable to the frailty or oddity of the first opinion.

For, note that the corrective opinion now under attack states:

> "* * * The question here concerns the nature of their tenure—whether it was a leasehold interest or a mere license.
>
> As bearing on the question whether these people were tenants or licensees of the owner the deed of

1. "However, appellant has but one cause of action. He is suing on one policy of insurance not on several policies, and he is not asking for reformation. His reliance upon estoppel is incidental only." *Smith v. Royal Ins. Co.*, 93 Fed. (2d) 143 at 146.

> 1897 proves nothing, either one way or the other. *Despite expressions to the contrary in our first opinion* (77 Fed. (2d) 157), the quoted language of the deed is entirely consistent with the existence of a tenancy. And we are constrained *to disapprove, also,* as not accurately reflecting the applicable law, the Court's intimation there concerning the necessity of appellant's proving an express lease. * * *" (Tr. 370.)

> "Appellant's tenure was terminable upon the happening of the contingency insured against, and the contingency occurred. *Understandably enough,* the case was decided below on the theory that to entitle appellant to recover he must prove an express lease for a term commensurate with the life of his structures. The insurance contract does not so provide; *and such is not the law of the case."* (Tr. 374.)

This language is a clear answer to the first point made by petitioner and The Circuit Court with commendable frankness was, at least in part, correcting its own error—and this frank confession comes perilously close to being an admission that the judgment initially obtained by your respondent should have been affirmed.

2. The trial Court's judgment was not correct under *either* the evidence, the pleadings *or* the law of the case.

(a) **As to the evidence,** the Circuit Court opinion holds that respondent proved the insurable interest described in the policy—and that the trial Court obviously erred in concluding "that plaintiff had no in-

terest in real property" (Tr. 89) and "no insurable interest in the property described in said policy" (Tr. 92) *in defiance of its own factual findings* (Tr. 79-86) that respondent and his predecessors for nearly a half a century used and occupied the land against the world and to the exclusion of the owners and with their consent and acquiescence, and paid monthly rents therefor continuously and without default.

(b) **The law of the case** petitioner claims required proof of an express lease ending with the destruction of the improvements. The trial Court erred in following counsel's suggestion. Certainly the Circuit Court is itself the best judge of the law of the case, which it makes. If there was any ambiguity that Court in its decision now under fire cures it—for note its language (Tr. 370):

> "* * * And we are constrained to disprove, also, as not accurately reflecting the applicable law, the Court's intimation there concerning the necessity of Appellant's proving an express lease * * * (and Tr. 374) for a term commensurate with the life of his structures. The insurance contract does not so provide; *and such is not the law of the case.*"
>
> "Significantly the policy fails to describe the leasehold as one for a fixed term such as would normally have appeared had the interest insured been evidenced by an express contract. Hence, to bring himself within the provisions of the policy Appellant need establish no more than an insurable interest in the nature of a leasehold. This he did. It was not essential that he go further and prove the existence of a tenancy for a term run-

> ning at all events until the destruction of his buildings."

(c) **The pleading** was always one upon a contract of insurance—the gravamen, *ex contractu*—the bare necessities of which ordinarily require the allegations of (a) a policy in full force and effect; (b) the happening of the contingency insured against; and (c) the existence of an insurable interest in the subject matter of the policy. The only question raised is as to the latter,—and as to that the trial Court erred not only in requiring the *over allegation* but in holding that only the outright proof of an express lease for a term commensurate with the life of the structures would satisfy the case. Again the complete answer is that the opinion now complained of not only corrects the error, but points the culpability when it states that (Tr. 374):

> "Understandably enough the case was decided below on the theory that to entitle Appellant to recover he must prove an express lease for a term commensurate with the life of his structures."

The conclusion is irrefutable, *then,* that petitioner's argument that "the decision creates, instead of correcting, error" is specious—for the most that may be said in that regard is that the Circuit Court was correcting its own error, if any—which it had not only the right, but the duty, to do.

And there is here no quarrel with the proposition that one may not allege one cause of action and prove another. But the cause of action, as heretofore dem-

onstrated, is and always was one upon a policy of insurance. The factual basis of the insurable interest does not alter the cause of action—here the insurable interest was *that* described in the policy—let us call it "X"—and a pleading is not fatally defective because it alleges the existence of insurable interest "X" and in addition "Y" and "Z".

Nor are we cited to any cases which, under circumstances similar to those involved herein, find any impropriety in the following direction (Tr. 374) of the Circuit Court:

> "Appellant may amend his pleading in conformity with his proof and Appellee may amend its answer if it so desires. On another trial Appellee will have the opportunity of proving such affirmative defenses as may be available to it."

That Court obviously felt that since petitioner may have been prejudiced or misled (as to which there is grave doubt) by the prior decision it should be remanded to the end and purpose of allowing *not a new trial* but a presentation of his affirmative defenses, if any. The authorities cited by counsel (pp. 7-12 his brief) do not even squint at a situation similar to that involved or presented by the present case.

B. **The second point** urged by petitioner is to the effect that a month-to-month tenancy is not a "lease" or "leasehold interest" within the meaning of fire insurance policies. This is hardly of sufficient moment, as we have already urged, to warrant any action on the part of this Court, but moreover, we know of no law which prevents an insurance company from writ-

ing a valued policy of fire insurance on any type of tenure or tenancy.

The contract was secured upon a tenure which had existed continuously and unchanged since 1884 (R. 79). And at the time of the occurrence of the fire, May 17, 1932, the tenure remained unchanged and the respondent had actually paid his rent to and including October 30, 1932. The owner had been accepting and the respondent paying his rent by the year in advance (Tr. 136). The land owner or lord never questioned the tenure. It is a stranger thereto who questions it.

In fact, no authorities other than those cited in the opinion are necessary to show that the tenure in question under the laws of the State of California, if not universally, is a leasehold interest—an insurable interest (*Davis v. Phoenix Ins. Co.*, 111 Cal. 409 at 414) —"for an estate in the land is a time in the land or land for a time" (*Brown v. Sweet*, 95 Cal. App. 117 at 123-4—and see *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 133 Iowa 205 at 207, 88 N. W. 985.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition should be denied.

Dated, San Francisco, California,
September 4, 1940.

A. B. BIANCHI,
JAMES M. HANLEY,
Attorneys for Respondent.